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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

STEPHEN C. BULLOCK, in his official
capacity as Governor of Montana;
MONTANA DEPARTMENT OF
REVENUE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE;
DAVID KAUTTER, in his official
capacity as Acting Commissioner of the
Internal Revenue Service; UNITED
STATES DEPARTMENT OF THE
TREASURY,

Defendants.

Case No.: _____

COMPLAINT

Because Defendants have unlawfully interfered with Montana's ability to gather data that the state needs in order to administer its tax laws, Plaintiffs respectfully seek this Court's intervention under the Administrative Procedure Act and allege as follows:

INTRODUCTION

1. The Internal Revenue Service (“IRS”) has long required organizations that are tax-exempt under § 501(c) of the Internal Revenue Code to collect and disclose the names and addresses of their substantial contributors. By statute, § 501(c)(3) charitable organizations must furnish this information to the IRS each year. 26 U.S.C. § 6033(b)(5). Section 6033 also authorizes the Secretary of the Treasury to require this information from other tax-exempt organizations, and the Secretary has promulgated regulations requiring all § 501(c) organizations to disclose this information to the IRS. 26 C.F.R. § 1.6033-2. Organizations disclose this information to the IRS on Schedule B of the Form 990.

2. Though substantial contributor information is first disclosed federally, many states examine the Form 990 and the Schedule B when making their own tax-exemption determinations. Federal law authorizes the IRS to share this information with state officials for the purpose of administering state laws. 26 U.S.C. § 6103(d).

3. On July 16, 2018, Defendants the Internal Revenue Service, the United States Department of the Treasury, and David Kautter, Acting Commissioner of the Internal Revenue Service, announced that the IRS would no longer require disclosure of substantial contributor information on the Schedule B for 501(c) organizations other than § 501(c)(3) groups. The change was made through a sub-regulatory document called a “Revenue Procedure”--specifically, Revenue

Procedure 2018-38.¹ Revenue Procedure 2018-38 amends a prior legislative rule-- 26 C.F.R. § 1.6033.2--and the Administrative Procedure Act (“APA”) requires agencies to notify the public and provide an opportunity for comment before amending a legislative rule. *See* 5 U.S.C. § 553(b). The IRS promulgated its new Revenue Procedure in violation of the APA without notice and without giving the public any opportunity to comment. Accordingly, because Defendants promulgated Revenue Procedure 2018-38 “without observance of procedure required by law,” under the APA, this Court must hold the revenue procedure unlawful and set it aside. 5 U.S.C. § 706(2)(D).

4. Montana law provides that Plaintiff Montana Department of Revenue (“MTDOR”) cannot grant tax-exempt status to organizations whose net income inures to the benefit of any private shareholder or individual (“private inurement”). Mont. Code. Ann. § 15-31-102(1). Because Montana law does not independently require organizations seeking tax-exempt status to file the names and addresses of their significant contributors with the state, MTDOR relies on the availability of this information from the IRS. *See* 26 U.S.C. § 6103(d). MTDOR also relies on the exhaustiveness of the IRS’s private inurement determinations. Changes that weaken the integrity of federal private inurement determinations will frustrate Montana’s tax regime, impose substantial pressure on Montana to change its laws, and require

¹ Available at <https://www.irs.gov/pub/irs-drop/rp-18-38.pdf>.

Montana to expend substantial resources to develop new procedures for state determinations.

PARTIES

5. The Montana Department of Revenue is an executive agency of the State of Montana. MTDOR resides within and throughout the State of Montana, including through its office in Great Falls. In administering Montana's tax laws, MTDOR determines whether organizations doing business in Montana qualify for tax-exempt status under state law.

6. Steve Bullock is the Governor of Montana. He is the state's chief executive and exercises supervisory authority over MTDOR pursuant to the Montana Constitution and state statute. He sues in his official capacity.

7. Defendant Internal Revenue Service is an executive agency of the United States within the meaning of the APA, 5 U.S.C. §§ 551, 701(b)(1).

8. Defendant United States Department of the Treasury is an executive agency of the United States within the meaning of the APA, 5 U.S.C. §§ 551, 701(b)(1).

9. Defendant David Kautter is the Acting Commissioner of the Internal Revenue Service. He is sued in his official capacity. He serves as the head of the IRS in Washington, D.C.

JURISDICTION AND VENUE

10. Because this action arises under the APA, this Court has federal question jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because Plaintiff MTDOR, an executive agency of the State of Montana, is a resident of this judicial district. Divisional venue is proper in the Great Falls Division under L.R. 3.2(b) and Mont. Code. Ann. §§ 25-2-118, -125 because Defendants IRS and United States Department of the Treasury are found throughout the state, and a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred in this Division.

BACKGROUND

I. PRIOR STATUTORY AND REGULATORY FRAMEWORK

12. Section 6033(b) of the Internal Revenue Code requires 501(c)(3) organizations to file annual reports disclosing “the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors.” 26 U.S.C. § 6033(b)(5). Substantial contributors are defined in 26 U.S.C. § 507(d)(2) as those having contributed more than \$5,000, in aggregate.

13. “Although the statute does not address contributor reporting by tax-exempt organizations other than those described in § 501(c)(3), the implementing regulations under § 6033(a) generally require all types of tax-exempt organizations

to report the names and addresses of all persons who contribute \$5,000 or more in a year under [26 C.F.R.] § 1.6033-2(a)(2)(ii)(f).” Revenue Procedure 2018-38, at *3 (describing regulatory background).

14. The disclosure requirements for tax-exempt organizations other than for organizations described in § 501(c)(3) are pursuant to a binding legislative rule, 26 C.F.R. § 1.6033-2. *See* Treasury Decision 7122, 36 Fed. Reg. 11,025 (June 8, 1971).

15. “Under existing rules, the names and addresses of contributors for all types of organizations are reported on Schedule B, ‘Schedule of Contributors,’ filed with Forms 990, 990-EZ, and 990-PF, or, with respect to organizations described in § 501(c)(21), in Part IV of Form 990-BL.” Revenue Procedure 2018-38, at *4 (describing relevant forms).

16. By regulation, the Commissioner of the IRS may relieve classes of organizations from filing disclosures if the Commissioner determines that the information to be disclosed is not necessary for the efficient administration of federal tax laws. 26 C.F.R. § 1.6033-2(g)(6). This regulation does not supersede the statutory requirement that amendments to legislative rules must be promulgated through the APA’s notice-and-comment process.

17. Federal law authorizes the IRS to share the returns and return information of 501(c) organizations--including the Schedule B--with certain state

officials for the purpose of, and to the extent necessary in, the administration of state laws. 26 U.S.C. § 6103(d).

18. The disclosures made by groups other than 501(c)(3) organizations and private foundations remain confidential from the public, but are available both to the IRS for its purposes and to state tax authorities, including Montana, pursuant to 26 U.S.C. § 6103(d).

II. THE ROLE OF DONOR IDENTITY IN PRIVATE INUREMENT DETERMINATIONS

19. Under federal law and the law of most states, social welfare organizations may not receive tax exemptions if any part of their earnings or income “inures to the benefit of any private shareholder or individual.” *See* 26 U.S.C. § 501(c)(4)(B). This is often referred to as the prohibition on private inurement.

20. To determine whether an organization violates the prohibition on private inurement--and thus may not receive tax-exempt status--tax authorities may look to that organization’s significant contributors. A similar determination dictates whether a group can maintain its tax-exempt status after it has been granted an exemption.

21. For example, if a plumber organized her business under the guise of a tax-exempt social welfare organization, she might receive tax-exempt income from her clients by means of “contributions.” But if a tax regulator reviewed the names and addresses of the plumber’s significant contributors, the regulator might

determine that these persons are the plumber's clients--not contributors--and that tax-exempt status is inappropriate.

22. Accordingly, the names and addresses of significant contributors are important to the ongoing administration of tax-exemption determinations, both at the state level and federally.

23. Given the strength and uniformity of federal disclosure requirements, many states treat the IRS's tax-exemption and private inurement determinations as highly reliable and persuasive--if not authoritative--in making their own state law determinations.

24. The names and addresses of significant contributors to federal tax-exempt organizations also play a significant role in ferreting out other nefarious activity conducted by entities masquerading as charitable, social welfare, or other such groups. For example, many § 501(c)(4) social welfare organizations use large portions of their funds to engage in political activity. Federal law prohibits foreign nationals from participating in federal, state, or local elections, such as by contributing to a campaign or by purchasing television or digital advertising to support a candidate in the immediate run-up to an election. *See* 52 U.S.C. § 30121. If the IRS knows that an organization is engaged in political activity, and receives a disclosure that the organization's only significant contributors are foreign nationals, then the IRS is well-positioned to identify and stop a serious violation of federal law.

Absent the names and addresses of the significant contributors, however, the IRS is less capable of making such a determination. Other nonprofit organizations that are exempt under § 501(c), such as §§ 501(c)(5) and (c)(6) organizations, may also use funds to engage in political activity, and so knowledge of the names and addresses of their substantial contributors is relevant to the enforcement of election law as well.

25. Sections 501(c)(4), (c)(5), and (c)(6) organizations have become particularly active in elections in recent years. By one estimate, campaign spending by “dark money” groups--primarily, organizations that are tax-exempt under §§ 501(c)(4), (c)(5), and (c)(6)--increased more than fifty-fold between 2004 and 2016. See Center for Responsive Politics, *Dark Money Basics*, <https://www.opensecrets.org/dark-money/basics> (last visited July 23, 2018) [<https://perma.cc/GQR2-6GDT>].

26. Beyond tax regulators, a range of other interests in civil society--candidates, election regulators, the press--rely on the accuracy and integrity of tax-exemption determinations for these organizations.

III. PROCEDURES FOR TAX-EXEMPT DETERMINATIONS BY THE STATE OF MONTANA

27. Plaintiff Governor Bullock exercises executive and supervisory authority over MTDOR and other executive agencies of the State of Montana. He is ultimately responsible for directing MTDOR’s administration of Montana’s tax laws, including operations and policies related to tax-exempt organizations.

28. Under Montana law, certain organizations qualify for exemptions from state taxation.

29. When an organization does business in the State of Montana, it is required to register with the Montana Secretary of State. Organizations may mark on their registration whether they intend to seek tax-exempt status in Montana. After registration at the Secretary of State, the information is forwarded to Plaintiff the Montana Department of Revenue.

30. Under Montana law, organizations cannot obtain tax-exempt status if any part of their net income inures to the benefit of any private shareholder or individual. Mont. Code. Ann. § 15-31-102(1). Any organization that does is likely to be denied tax-exempt status under Montana law.

31. Organizations indicating that they wish to seek a tax exemption from the State of Montana must demonstrate that no part of their net income inures to the benefit of any private shareholder or individual. Organizations begin by completing Montana tax form EXPT,² indicating entity type, address, contact person, and other information. Organizations are also required to submit articles of incorporation, by-laws, latest financial statement showing assets, liabilities, receipts and disbursements, and an “affidavit showing the character of the organization, the

² Available at <https://app.mt.gov/myrevenue/Endpoint/DownloadPdf?yearId=178> [hereinafter “Form EXPT”].

purposes for which it was organized, its actual activities, the sources and disposition of its income, and whether any of its income may inure to the benefit of any private shareholder or individual.” Form EXPT.

32. The sources of an organization’s income--particularly the identities of its significant contributors--are important in determining whether the organization complies with the prohibition on private inurement. Because of the rigor of the existing federal tax-exemption process, federal tax-exemption determinations are part of Montana’s analysis for tax exemptions. Applicant organizations must indicate whether they have received a federal exemption, and Plaintiff MTDOR relies on the IRS’s tax-exemption determinations. In this process, some organizations submit complete federal Form 990s and attendant schedules, including the Schedule B containing significant contributor information, when seeking Montana tax-exempt status.

33. Once an organization has received tax-exempt status from Montana, Plaintiff MTDOR may later review this determination and seek additional information. For these post-determination investigations, MTDOR may request the names and addresses of significant contributors from the IRS. Federal law authorizes the IRS to share this information with state officials for the purpose of administering state laws. 26 U.S.C. § 6103(d).

34. By eliminating the requirement that significant contributor information be reported to the IRS for groups other than 501(c)(3) charities, Revenue Procedure 2018-38 effects several distinct kinds of injury to Montana.

35. First, Revenue Procedure 2018-38 harms Montana's ability to conduct private inurement determinations for tax-exempt organizations doing business in the state, both by reducing the information available to the state from the IRS and by weakening the overall rigor and reliability of the federal process.

36. Montana's private inurement determinations rely on the strength of the federal tax-exemption process, including the vigorous disclosure requirements for significant contributors provided by 26 U.S.C. § 6033(b)(5) and 26 C.F.R. § 1.6033-2. These disclosure requirements bolster the overall quality of federal tax-exemption determinations. If significant contributor information is not reported to the IRS for groups other than § 501(c)(3) charities, it will harm Montana's ability to make private inurement determinations by degrading the quality and reliability of the federal private inurement determinations.

37. Moreover, if the IRS no longer requires certain tax-exempt organizations to disclose the names and addresses of significant contributors, then Montana can no longer request that information from the agency when conducting its own determinations. Because Montana will be forced to obtain this information

from potentially thousands of organizations directly, rather than from the IRS, this frustrates the efficient administration of Montana's tax laws.

38. Montana has over 10,000 tax-exempt organizations, the greatest number per capita in the United States and nearly twice the national average.³ Whenever Montana grants tax-exempt status to an organization, it may be forgoing income that would otherwise contribute to the state's treasury. An increased rate of mistakes, or decreased reliability, in the tax-exemption process exposes the state to additional financial loss. It also increases the potential for abuse of Montana's tax-exempt status granted by the state.

39. Second, by eliminating the requirement that names and addresses of significant contributors be disclosed to the IRS for groups other than § 501(c)(3) charities, Revenue Procedure 2018-38 will shoulder Montana with additional financial and administrative burdens connected to private inurement determinations.

40. Damage to the strength of these disclosure requirements at the federal level requires state tax agencies like Plaintiff MTDOR to fundamentally change their state tax-exemption review processes, including adopting new administrative rules, developing new forms and processes, requiring new and state-specific information,

³ See Scott Greenberg, *Which States Have the Most Tax-Exempt Organizations?*, Tax Foundation, Dec. 29, 2015, <https://taxfoundation.org/which-states-have-most-tax-exempt-organizations>.

and devoting more staff and other government resources away from other areas of tax administration and toward tax-exempt organizations practice.

41. Montana will be forced to assume the burden of developing unique processes to solicit the significant contributor information contained in the current Form 990, Schedule B, including legislative and rule changes. Montana's current affidavit requirements do not contain the level of specificity required by the Form 990, Schedule B.

42. Moreover, where previously the State of Montana could access significant contributor information in one, centralized location--the IRS--now that the IRS will no longer collect such information, Montana will be required to solicit it from every new applicant organization individually, and annually from the thousands of extant organizations that have already received tax-exempt status from Montana but that will not report their significant contributors to the IRS in future years.

43. For state governments like Montana's, there is a significant burden involved in reorienting tax processes. At present, Montana does not have any full-time staff or general fund monies devoted to tax-exempt organizations practice.

44. On information and belief, other states--including those that require the federal Schedule B to be filed, as well as those that do not require it but rely on the overall strength of federal disclosures in making their determinations--will face the

same or greater burdens if significant contributors are no longer disclosed to the IRS under 26 C.F.R. § 1.6033-2.

45. Third, by eliminating the requirement that names and addresses of significant contributors be disclosed to the IRS for groups other than § 501(c)(3) charities, Revenue Procedure 2018-38 causes Montana to suffer informational injury. *See Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998) (recognizing “informational injury” as “injury in fact”). The names and addresses of significant contributors for organizations other than § 501(c)(3) charities are available to the State of Montana by statute. 26 U.S.C. § 6103(d). The information will not be available by this statutory mechanism if it is no longer disclosed to the IRS.

46. Fourth, the State of Montana, by and through its Department of Revenue and its chief executive Governor Bullock, has a quasi-sovereign interest in the administration of its own tax laws and policies. Taxation is a sovereign power of the states. If the names and addresses of significant contributors are not reported to the IRS for groups other than § 501(c)(3) charities, it will invade upon Montana’s quasi-sovereign interest in the administration of its tax policies.

47. Plaintiffs Governor Bullock, in his official capacity as Governor of the State of Montana, and MTDOR, an executive agency of the State of Montana, are not “normal litigants for the purposes of invoking federal jurisdiction.”

Massachusetts v. EPA, 549 U.S. 497, 518 (2007). Here, “[t]he parties’ dispute turns on the proper construction of a congressional statute, the APA, which authorizes challenges to final agency action for which there is no other adequate remedy in a court.” *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015) (quoting *Mass. v. EPA*, 549 U.S. at 518; 5 U.S.C. § 704), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016).

48. If the names and addresses of significant contributors to § 501(c) organizations other than § 501(c)(3) charities are not disclosed to the IRS, it will “impos[e] substantial pressure” on the State of Montana to change its laws. *See id.* at 153. “[S]tates have a sovereign interest in the ‘power to create and enforce a legal code.’” *Id.* (citation omitted). Montana “would incur significant costs” in changing its laws to create a new procedure for the collection of significant contributor names and addresses for use in its private inurement determinations. *See id.* at 155.

IV. REVENUE PROCEDURE 2018-38⁴

49. On July 16, 2018, Defendants announced that organizations other than §§ 501(c)(3) and 527 political groups will no longer be required to disclose the names and addresses of their substantial contributors under 26 C.F.R. § 1.6033-2.

50. Defendants purported to effect this change by way of a sub-regulatory, internal guidance document called a Revenue Procedure.

⁴ Available at <https://www.irs.gov/pub/irs-drop/rp-18-38.pdf>.

51. Typically, an IRS “Revenue Procedure . . . is an internal procedural rule that does not create or determine any rights, obligations, or legal consequences.” *See Facebook, Inc. v. Internal Revenue Serv.*, No. 17-CV-06490-LB, 2018 WL 2215743, at *17 (N.D. Cal. May 14, 2018) (citations omitted).

52. Revenue Procedure 2018-38 states that

tax-exempt organizations required to file the Form 990 or Form 990-EZ, other than those described in § 501(c)(3), will no longer be required to provide names and addresses of contributors on their Forms 990 or Forms 990-EZ and thus will not be required to complete these portions of their Schedules B (or complete the similar portions of Part IV of the Form 990-BL). Similarly, organizations described in § 501(c)(7), (8), or (10) will no longer be required to provide on Forms 990 or Forms 990-EZ the names and addresses of persons who contributed more than \$1,000 during the taxable year to be used for exclusively charitable purposes.

Revenue Procedure 2018-38, at *6.

53. In other words, Revenue Procedure 2018-38 purports to relieve organizations of the obligation to report contributors’ names and addresses previously required by 26 C.F.R. § 1.6033-2.

54. Revenue Procedure 2018-38 is a reviewable “final agency action” within the meaning of the APA, 5 U.S.C. § 704, because it represents the culmination of the agency’s decision-making and “determines rights or obligations or triggers legal consequences.” *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 n.4 (2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). There is nothing

tentative about Revenue Procedure 2018-38, and it determines organizations' rights and obligations by relieving organizations other than § 501(c)(3) charities of the obligation under 26 C.F.R. § 1.6033-2 to furnish the names and addresses of their substantial contributors.

55. In promulgating Revenue Procedure 2018-38, Defendants provided no notice or opportunity for comment.

56. Additionally, Defendants did not supply a reasoned analysis of their decision to amend a legislative rule when promulgating Revenue Procedure 2018-38.

57. Because Defendants' actions did not conform with the requirements of the APA for amending a legislative rule, Defendants have acted in excess of their statutory authority or limitations.

58. Had Plaintiffs been given notice and afforded an opportunity to comment, they would have notified Defendants of the significant, adverse effects of the putative change in disclosure rules. Reduced transparency for § 501(c) organizations at the federal level has significant downstream effects. In the context of elections and election spending, reduced transparency at the IRS upends settled expectations that federal tax-exempt organizations are what they purport to be: domestically-funded social welfare groups validly participating in elections, for example. Absent the disclosure of the names and addresses of significant

contributors to the IRS, the task of eradicating foreign influence in elections becomes harder if state and federal campaign finance officials cannot rely on the IRS. The same goes for tax officials seeking to determine whether organizations are evading requirements about what proportion of their funds can be dedicated to political activity. And for state treasuries, reduced disclosure of significant contributor information makes it far harder for tax officials to target abuse of the tax-exempt designation.

COUNT ONE:
**FAILURE TO OBSERVE PROCEDURE FOR RULEMAKING REQUIRED
BY LAW IN VIOLATION OF THE APA**

59. Plaintiffs repeat and reallege each of the foregoing allegations.

60. The APA requires courts to “hold unlawful and set aside agency action” that has been promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

61. Revenue Procedure 2018-38 is a substantive or legislative rule because it purports to amend the disclosure requirements contained in 26 C.F.R. § 1.6033-2 and to change the obligations and legal consequences for certain tax-exempt organizations around disclosure; it “effect[s] a change in existing law” because it “effectively amends a prior legislative rule.” *Wilson v. Lynch*, 835 F.3d 1083, 1099 (9th Cir. 2016) (citation omitted).

62. Before a substantive rule like Revenue Procedure 2018-38 may take

effect, the APA requires the agency to issue a notice of proposed rulemaking that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved” in order to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(b)(3), (c).

63. Defendants did not comply with this notice-and-comment requirement in promulgating Revenue Procedure 2018-38. Rather, Defendants merely purported to announce it as applicable for returns that will become due on or after May 15, 2019.

64. The fact that Defendants labeled the substantive change a “Revenue Procedure” does not excuse their violation of the APA. Moreover, a provision that allows the Commissioner to relax some filing requirements does not allow Defendants to evade notice-and-comment: that provision does not permit Defendants to wholesale repeal substantive disclosure requirements that affect obligations and have legal consequences outside of the procedures of the APA for legislative rules.

65. Plaintiffs MTDOR and Bullock have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

66. Plaintiffs MTDOR and Bullock have “no other adequate remedy in a court.” 5 U.S.C. § 704.

67. Defendants’ action in promulgating Revenue Procedure 2018-38 has harmed and will continue to harm Plaintiffs MTDOR and Bullock by impairing Montana’s ability to make tax-exemption determinations.

COUNT TWO:
UNAUTHORIZED AGENCY ACTION IN VIOLATION OF THE APA

68. Plaintiffs repeat and reallege each of the foregoing allegations.

69. The APA forbids agency action “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C).

70. The disclosure requirements for tax-exempt organizations other than those described in § 501(c)(3) are pursuant to a binding legislative rule, 26 C.F.R. § 1.6033-2, that was promulgated according to the relevant requirements under the APA, including notice-and-comment. *See* 5 U.S.C. § 553.

71. The Commissioner’s ability to relieve certain unnecessary filing requirements under § 1.6033-2(g)(6) does not supersede the statutory requirement that amendments to legislative rules must be promulgated through the APA’s notice-and-comment process.

72. By purporting to amend a legislative rule without conforming to the requirements of the APA, Defendants have acted in excess of their statutory authority or limitations.

73. The fact that Defendants labeled the substantive change a “Revenue Procedure” does not excuse their violation of the APA. Revenue Procedure 2018-38 is a substantive or legislative rule because it purports to amend the disclosure requirements contained in 26 C.F.R. § 1.6033-2 and to change the obligations and legal consequences for certain tax-exempt organizations around disclosure; it “effect[s] a change in existing law” because it “effectively amends a prior legislative rule.” *Wilson v. Lynch*, 835 F.3d at 1099 (citation omitted).

74. Plaintiffs MTDOR and Governor Bullock have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

75. Plaintiffs MTDOR and Bullock have “no other adequate remedy in a court.” 5 U.S.C. § 704.

76. Defendants’ actions in promulgating Revenue Procedure 2018-38 have harmed and will continue to harm Plaintiffs MTDOR and Governor Bullock.

COUNT THREE:
ARBITRARY AND CAPRICIOUS RULEMAKING IN VIOLATION OF
THE APA

77. Plaintiffs repeat and reallege each of the foregoing allegations.

78. The APA forbids agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

79. To comply with the APA, an agency must supply a “reasoned analysis” of its decision to amend a legislative rule. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

80. In promulgating Revenue Procedure 2018-38, Defendants did not supply a reasoned analysis of the decision to relieve tax-exempt organizations other than § 501(c)(3) charitable organizations from the requirement that they furnish the names and addresses of their substantial contributors.

81. The fact that Defendants labeled their substantive change a “Revenue Procedure” does not excuse their violation of the APA. Moreover, a provision that allows the Commissioner to relax some filing requirements does not allow Defendants to amend a legislative rule without supplying a reasoned analysis. That provision does not permit Defendants to wholesale repeal substantive disclosure requirements that affect obligations and legal consequences outside of the procedures of the APA for legislative rules.

82. Plaintiffs MTDOR and Governor Bullock have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

83. Plaintiffs MTDOR and Bullock have “no other adequate remedy in a court.” 5 U.S.C. § 704.

84. Defendants' actions in promulgating Revenue Procedure 2018-38 have harmed and will continue to harm Plaintiffs MTDOR and Governor Bullock.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Issue an order and judgment setting aside Revenue Procedure 2018-38 under 5 U.S.C. § 706(2);
- b. Award Plaintiffs their costs, attorneys' fees, and other disbursements for this action; and
- c. Grant any other relief this Court deems appropriate.

Dated: July 24, 2018

Respectfully submitted,

/s/ Raphael Graybill
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Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

In accordance with Local Rules 7.1 and 24.1 of the Rules of Procedure of the United States District Court for the District of Montana, I certify the following concerning the Complaint:

1. the document is double spaced except for footnotes and quoted and indented material;
2. the document is proportionally spaced, using Times New Roman, 14 point font; and
3. The document contains 4,658 words as calculated by Microsoft Word.

Dated: July 24, 2018

/s/ Raphael Graybill
Raphael Graybill

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Montana Department of Revenue; Bullock, Stephen, C., in his official capacity as Governor of Montana

(b) County of Residence of First Listed Plaintiff Cascade (statewide)

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
see attachment

DEFENDANTS

Internal Revenue Service; United States Department of the Treasury; Kautter, David, J., in his official capacity as Acting Commissioner of the IRS

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 875 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutional of State Statutes	Click here for: Nature of Suit Code Descriptions. <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 U.S.C. § 702

Brief description of cause:

Challenge to final agency action - rulemaking

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

07/24/2018

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Attachment: Attorneys

Office of the Governor

PO Box 200801

Helena, MT 59620-0801

ph. (406) 444-3179

fax. (406) 444-5529

raphael.graybill@mt.gov

Raphael Graybill (Attorney of Record)

Chief Legal Counsel

Stephen C. Bullock

Special Counsel

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
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PO Box 200801
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ph. (406) 444-3179
fax. (406) 444-5529
raphael.graybill@mt.gov
Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

STEPHEN C. BULLOCK, in his official
capacity as Governor of Montana;
MONTANA DEPARTMENT OF
REVENUE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE;
DAVID KAUTTER, in his official
capacity as Acting Commissioner of the
Internal Revenue Service; UNITED
STATES DEPARTMENT OF THE
TREASURY,

Defendants.

Case No.: _____

SUMMONS IN A CIVIL ACTION

TO: Internal Revenue Service; 1111 Constitution Ave. NW, Washington,
DC 20224

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)--or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed.R.Civ.P. 12 (a)(2) or (3)--you must serve on the Plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiff or Plaintiff's attorney, whose name and address are:

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
STEPHEN C. BULLOCK
Special Counsel
PO Box 200801
Helena, MT 59620-0801
ph. (406) 444-3179
fax. (406) 444-5529
raphael.graybill@mt.gov
Attorneys for Plaintiffs

If you fail to respond, judgment by default will be entered against you for the relief demanded in the Complaint.

You also must file your answer or motion with the court.

Clerk of Court

Date: _____

Signature of Clerk or Deputy Clerk

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
STEPHEN C. BULLOCK
Special Counsel
PO Box 200801
Helena, MT 59620-0801
ph. (406) 444-3179
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raphael.graybill@mt.gov
Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

STEPHEN C. BULLOCK, in his official
capacity as Governor of Montana;
MONTANA DEPARTMENT OF
REVENUE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE;
DAVID KAUTTER, in his official
capacity as Acting Commissioner of the
Internal Revenue Service; UNITED
STATES DEPARTMENT OF THE
TREASURY,

Defendants.

Case No.: _____

SUMMONS IN A CIVIL ACTION

TO: David Kautter, in his official capacity as Acting Commissioner of the
Internal Revenue Service; 1111 Constitution Ave. NW, Washington,
DC 20224

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)--or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed.R.Civ.P. 12 (a)(2) or (3)--you must serve on the Plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiff or Plaintiff's attorney, whose name and address are:

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
STEPHEN C. BULLOCK
Special Counsel
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Helena, MT 59620-0801
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fax. (406) 444-5529
raphael.graybill@mt.gov
Attorneys for Plaintiffs

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Clerk of Court

Date: _____

Signature of Clerk or Deputy Clerk

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
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STEPHEN C. BULLOCK, in his official
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Plaintiffs,

vs.

INTERNAL REVENUE SERVICE;
DAVID KAUTTER, in his official
capacity as Acting Commissioner of the
Internal Revenue Service; UNITED
STATES DEPARTMENT OF THE
TREASURY,

Defendants.

Case No.: _____

SUMMONS IN A CIVIL ACTION

TO: United States Department of the Treasury, 1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)--or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed.R.Civ.P. 12 (a)(2) or (3)--you must serve on the Plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the Plaintiff or Plaintiff's attorney, whose name and address are:

RAPHAEL GRAYBILL
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Office of the Governor
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Helena, MT 59620-0801
ph. (406) 444-3179
fax. (406) 444-5529
raphael.graybill@mt.gov
Attorneys for Plaintiffs

If you fail to respond, judgment by default will be entered against you for the relief demanded in the Complaint.

You also must file your answer or motion with the court.

Clerk of Court

Date: _____

Signature of Clerk or Deputy Clerk